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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re J.G., a Person Coming Under the Juvenile Court Law.	H034061 (Santa Clara County Super. Ct. No. JV34818)
THE PEOPLE, Plaintiff and Respondent, v. J.G., Defendant and Appellant.	

Jose Pinto Lopez, whom we shall refer to as Pinto, was beaten by a group of young men after he yelled and gestured at them while they were playing basketball. Witnesses at the park for a company picnic saw the fight and particularly saw the young men kicking Pinto and hitting him with their fists. Pinto and other witnesses identified J.G. as one of the assailants.

A Sunnyvale Police Officer who was designated as a witness on the subject of gangs testified that J.G. and the others were members of the Sunnyvale Sureno Tres gang, known as SST and it was the officer's opinion that the crime was committed "in association with the Sureno SST criminal street gang."

J.G. argues on appeal that two probation conditions imposed upon were vague, overbroad and violated his state and federal due process rights. The two conditions are: "26. That the minor not frequent any areas of gang related activity and not participate in any gang activity;" and "27. That the minor not own, use, or possess any dangerous or deadly weapons and not remain in any building, vehicle, or the presence of any person where dangerous or deadly weapons exist[.]"

We know that these are standard conditions from a list of such in wide use in the Santa Clara County Superior Court. The Attorney General concedes their over breath but argues that since there was no objections to these conditions and indeed there was a statement by defense counsel as follows: "Your Honor, I think they're appropriate recommendations and I've talked with the family. They are in favor of them. I would submit the matter." As to condition number 26 "That the minor not frequent any areas of gang related activity and not participate in any gang activity," we will quote from our recent case of *In re H.C* (2009) 175 Cal.App.4th 1067. " 'That the minor not frequent any areas of gang related activity and not participate in any gang activity.' This condition presents two separate commands, the former being much more difficult to interpret than the latter. 'Frequenting' any areas of gang related activity is not so much overbroad as obscure. To 'frequent,' a verb form, no longer in common usage would be especially challenging to understand, indeed at oral argument in similar cases neither the Attorney General nor defense counsel could define it. The Oxford English Dictionary says it means, in its verb form, "to visit or make use of (a place) often; to resort habitually.' [Citation.]" (*Id*. at p. 1072.) "The adjectival form of 'frequent' relates to an assembly sometimes used as 'assembled in great numbers, crowded, full.' The vice in the usage of this word cuts both ways. How the district attorney would prove that someone 'habitually' visited an area of gang activity challenges the imagination. The common case would occur with the police picking up the minor in such an area—how does one turn one encounter into habitual visits? On the other hand, the minor would not violate

the condition with one or two visits, yet we glean from the record that the trial court intended the minor not to visit such areas at all.

"But this is not the most difficult part of the first clause. Understanding the phraseology of 'frequent' to mean 'being in areas of gang-related activity' suggests more than one issue of interpretation. An area with 'gang-related activity' might be, in some instances, an entire district or town. It would be altogether preferable to name the actual geographic area that would be prohibited to the minor and then to except from that certain kinds of travel, that is, to school or to work. At the very least the condition, . . . should be revised to say the minor not visit any area known to him to be a place of gang-related activity." (*In re H.C, supra*, 175 Cal.app.4th at p. 1072.)

As to condition number 27, that the minor not own, use, or possess any dangerous or deadly weapons and not remain in any building, vehicle, or the presence of any person where dangerous or deadly weapons exist, needs only minor changes to make it specific. The Attorney General suggests the following modification and we think it is adequate with the addition of the words "known to him in the last line" so that the condition is modified "That the minor not unlawfully own, use, or possess any item that he knows to be capable of being used in a dangerous or deadly manner and that the minor not be present in any place where he knows another person unlawfully posses such an item."

Despite the evidence in the record that shows that not only did the defendant through his attorney fail to object to these conditions but affirmatively agreed that they were appropriate. We will not deem the objection waived. It seems to us that the question of ineffective assistance of counsel in this context amounts to very little. These two conditions in their current form are neither understandable or enforceable. Thus if J.G.'s attorney failed to object and approved of them it would not change or affect the case. They would remain overbroad and unconstitutionally vague. We are able to understand why a competent attorney might say such a thing to a court thinking, overall, it was in the best interest of the minor to have such restrictions placed on his conduct.

Nevertheless, such conditions, because of their form would remain outside the enforcement powers that the juvenile court might have.

DISPOSITION

Probation condition number 27 is amended as set forth in the body of this opinion. As to probation condition number 26, the order imposing such condition is reversed and the matter remanded to the trial court.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.